LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1967

LOUISVILLE CHAIR COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C., 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MORTON J. COHEN,
Assistant General Counsel,

J. RICHARD TERRELL,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	2
Argument	7
Conclusion	10

CITATIONS

Cases:

Butcher Boy Refrigerator Door Co. v. *National Labor Relations Board*, 290 F. 2d 22	10
National Labor Relations Board v. *Fitzgerald Mills Corp.*, 313 F. 2d 260	10
National Labor Relations Board v. *Mattison Machine Works*, 365 U.S. 123	9
National Labor Relations Board v. *Pittsburgh S.S. Co.*, 340 U.S. 498	9
National Labor Relations Board v. *A. Sartorius & Co.* 140 F. 2d 203	10
National Labor Relations Board v. *Sea-Land Service, Inc.*, 356 F. 2d 955	10
National Labor Relations Board v. *Stackpole Carbon Co.*, 105 F. 2d 167	10
National Labor Relations Board v. *Stilley Plywood Co.*, 199 F.2d 319, certiorari denied, 344 U.S. 933	10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	9

Statutes:

National Labor Relations Act as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)	2
Section 8(a)(1)	3, 7
Section 8(a)(3)	3
Section 8(a)(5)	7
NLRB Rules and Regulations and Statements of Procedure (29 C.F.R. 101.1, *et seq.*)	2
Section 102.69(c)	7

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1158

LOUISVILLE CHAIR COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 385 F. 2d 922. The decision and order of the National Labor Relations Board (Pet. App. 13a-69a) are reported at 161 NLRB No. 31.

JURISDICTION

The decision of the court of appeals was entered on December 1, 1967 (Pet. App. 1a). The petition

for a writ of certiorari was filed on February 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly concluded that the employer's objections to a representation election did not raise issues which warranted an evidentiary hearing.

2. Whether substantial evidence supports the Board's finding that a strike called by the union was attributable, at least in part, to the employer's unfair labor practices.

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) and of the Board's Rules and Regulations and Statements of Procedure (29 C.F.R. 101.1, *et seq.*) are set forth in Appendix C to the petition (Pet. App. 71a-79a).

STATEMENT

Early in 1965, the Union [1] began an organizing campaign among the approximately 300 production and maintenance employees at the Company's plant in Louisville, Kentucky (Pet. App. 16a-17a). As described below, the campaign culminated in a Board election which the Union won, and the Board certified

[1] Local 236, United Furniture Workers of America, AFL-CIO.

it as the employees' bargaining representative. The Board found that the Company violated Section 8(a)(1) and (3) of the Act by threatening employees with reprisals because of their union activity, and by refusing to consider an applicant for employment because of his past union activity (Pet. App. 21a-24a, 32a-34a, 41a-49a). The court of appeals sustained these findings (Pet. App. 2a-6a), and petitioner does not challenge them here. Petitioner, however, challenges the Board's further findings that it refused to bargain with the Union, and that a strike which ensued was attributable to its unfair labor practices. The relevant facts with regard to these issues are as follows:

On May 12, 1965, the Union distributed a handbill to the employees stating that a Board election would be held on May 27,[2] and urging them to vote for the Union (J.A. 447a-448a). At the end of the handbill the following statement appeared (*ibid.*):

> The Company's gross profit for the last fiscal year was—$1,730,111—VOTE YES. Lets get our share of the pie!!

On May 24, the Union distributed a second handbill which again stated that the Company's gross profit for the prior year was $1,730,111 (J.A. 449a-450a).

The Board election, held on May 27, resulted in a vote of 187 for and 112 against the Union, with 3 void ballots (Pet. App. 17a, 49a; J.A. 434a). The Company filed objections to the election, contending

---

[2] The Union had filed a petition for an election with the Board on February 4 (J.A. 404a-407a). "J.A." refers to the Joint Appendix filed in the court below.

that: (1) the reference to gross rather than net profits in the Union's handbills was "grossly and materially misleading"; and (2) although 302 ballots were cast, only 300 of the 307 names on the eligibility list had been checked off by the election observers[3] as having voted (Pet. App. 49a-50a; J.A. 435a-437a). After investigation, the Board's Regional Director concluded that neither of the Company's objections raised substantial or material issues warranting a hearing or setting aside the election; accordingly, he overruled the Company's objections and certified the Union as the employees' representative (Pet. App. 50a; J.A. 441a-447a, 43a). In finding that the pre-election handbills did not impair the employees' freedom of choice in the election, the Director noted that the statements were accurate and contained no threat of reprisal, promise of benefit or material misrepresentation, and, in addition, that the Company had ample time (two weeks) to make any explanation it may have deemed necessary (J.A. 444a-445a). With respect to the existence of two more ballots than there were names checked off on the eligibility list, the Director noted that the Company had an observer at the election, that it failed to offer any evidence of wrongdoing, and that the two extra ballots could not have affected the election (J.A. 445a-446a).

On July 19, the Union requested a meeting with the Company to negotiate a collective bargaining agreement (Pet. App. 50a; J.A. 492a). The Company refused to meet with the Union on the ground

---

[3] Both the Union and the Company had observers present at the election.

that it planned to appeal the Director's decision to the Board. The Company thereupon filed various motions with the Board, all of which were denied as raising "no substantial issues" (Pet. App. 50a-51a; J.A. 450a, 484a, 489a, 491a).

On August 4, the Union held a meeting of the Company employees whom it represented (Pet. App. 55a; J.A. 214a). The notice for this meeting stated:

> A SHOWDOWN IS COMING . . . Already plans are being made for joint action between *Furniture Workers Local 236 and Teamsters Local 89*.[4] The negotiating committees of Local 236 and Local 89 will meet prior to the general membership meeting on Wednesday, at 5:30 P.M. [Pet. App. 55a; J.A. 503a, 504a.]

Approximately 175 employees attended the meeting and voted unanimously to give the Union's negotiating committee authority to call a strike at its discretion (Pet. App. 55a; J.A. 214a, 215a). A Union representative had requested such authorization in view of the Company's continued harassment of union adherents and its continuing refusal to bargain (Pet. App. 55a-56a; J.A. 216a). The next day the Union sent a telegram to the Company stating that its refusal to bargain was an unfair labor practice and that the employees present at the Union's meeting had voted unanimously to strike (Pet. App. 56a; J.A. 505a-506a).

---

[4] On December 23, 1964, Teamsters' Local 89 was certified as the representative of the Company's truckdrivers. Around February 1, negotiations commenced with Local 89, but, by August, an agreement had still not been reached (Pet. App. 55a; J.A. 350a).

The Union did not strike at that time, but agreed to meet with the Company under the auspices of the Federal Mediation and Conciliation Service (Pet. App. 56a-57a; J.A. 604a-605a). On the morning of August 17, however, Teamsters Local 89 (see n. 4, *supra*) struck and began to picket the plant (Pet. App. 58a; J.A. 358a). The Union held a meeting at noon, and the employees, after being told that there was no indication that the Company intended to bargain, voted to strike immediately (Pet. App. 58a; J.A. 218a-219a). Pickets were posted in front of the plant, with signs reading: "UFWA-AFL-CIO, United Furniture Workers on strike, Louisville Chair Company refuses to bargain with Local 236;" and "AFL-UFWA-CIO on strike against the unfair labor practices of the Louisville Chair Company. Local 236." (Pet. App. 58a; J.A. 248a.)

On September 17, the Company and Teamsters Local 89 reached an agreement, and the drivers represented by that union returned to work shortly thereafter (Pet. App. 59a; J.A. 359a). The production and maintenance workers, however, remained on strike (Pet. App. 59a).[5] On October 21, the General Counsel of the Board, based upon charges filed by the Union, issued an unfair labor practice complaint against the Company (Pet. App. 16a).

At the unfair labor practice hearing the Company sought to relitigate the issues respecting the Union handbills and the two-ballot discrepancy which it had

---

[5] They were still on strike in November, at the time of the Board unfair labor practice hearing (Pet. App. 59a).

raised in the representation proceeding. The Trial Examiner excluded this evidence because it was substantially the same as that presented in the representation proceeding (Pet. App. 51a-52a); he further found that the Company "has not supplied specific evidence which *prima facie* would warrant setting aside the election * * * at any stage of these proceedings" (Pet. App. 53a). The Board, adopting the Examiner's findings, held, *inter alia*, that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, that the strike was an unfair labor practice strike since at least one of its causes was the Company's unlawful refusal to bargain, and that the Company was thus obligated to reinstate the strikers upon their application (Pet. App. 53a-54a, 59a-60a). The Board ordered the Company to bargain upon request with the Union and to offer reinstatement to the striking employees (Pet. App. 14a, 65a).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-12a).

ARGUMENT

1. The principal question presented (Pet. 10-17) is whether the Company's two objections to the representation election raised substantial and material issues of fact which required an evidentiary hearing.[6] This issue, which turns on the circumstances of this

---

[6] Section 102.69(c) of the Board's Rules (Pet. App. 78a-79a) provides for an evidentiary hearing where objections present "substantial and material factual issues."

particular case, does not warrant further review. Moreover, the court below correctly concluded that the Board properly rejected the Company's objections without a hearing.

There is no dispute as to what the Union's handbills said; the dispute concerns the Board's conclusion that the reference in the handbills to the Company's gross, rather than its net, profits did not interfere with the employees' freedom of choice in the election. An evidentiary hearing was not required to resolve that issue, which turned on the significance of undisputed facts. Furthermore, the Board properly rejected the Company's contention. As the court below pointed out, "ambiguity in campaign propaganda is not sufficient by itself to vitiate an election," particularly where, as here, "the handbills did not contain material within the special knowledge of the Union * * *, and [they were] not disseminated at a time or in a manner calculated to deprive the [Company] of an opportunity to reply" (Pet. App. 8a).

Nor was the Company entitled to a hearing on its objection that two "extra" ballots had been cast. Such a minor discrepancy between the number of ballots counted and the number of voters checked off on the eligibility list did not impair the validity of the election. Since the Union won by 75 votes, the two ballots could not have affected the outcome. The discrepancy does not indicate that the election procedure was intrinsically defective. A person improperly or accidentally left off the eligibility list may have voted, or a person on the list may have voted without having his name checked off. In these circumstances, the burden

was on the Company to show how the discrepancy affected the results of the election[7]—a burden which, as the court below found (Pet. App. 9a), it did not sustain.[8]

2. The Company also contends (Pet. 17-18) that the court below erred in affirming the Board's finding that the strike of August 17 was an unfair labor practice strike because it was caused, at least in part, by the Company's refusal to bargain in good faith with the Union. The question whether the strike was caused by the Company's unfair labor practices, or was purely a sympathetic response to the Teamsters' strike (as the Company contends), presents only an evidentiary issue which does not warrant further review. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the facts summarized in the Statement, *supra*, pp. 5-6, and in the opinion of the court below (Pet. App. 11a-12a), show that the Board was fully justified in concluding that the Company's unfair labor practices were at least one of the

---

[7] "In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order." *National Labor Relations Board* v. *Mattison Machine Works*, 365 U.S. 123, 124.

[8] The cases relied on by the Company (Pet. 14-16) are distinguishable. They either involve situations where there was no opportunity to reply to the union's misrepresentation, or the objections to the election raised substantial and material issues of fact.

causes of the strike; and that fact justified the Board in ordering reinstatement of the strikers.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

J. RICHARD THESING,
Attorney,
National Labor Relations Board.

MARCH 1968.

---

[9] "It is well established that 'a strike may be an unfair labor practice strike even though it also has economic objectives.' " *National Labor Relations Board* v. *Sea-Land Service, Inc.*, 356 F. 2d 955, 965 (C.A. 1). Accord: *National Labor Relations Board* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (C.A. 2); *Butcher Boy Refrigerator Door Co.* v. *National Labor Relations Board*, 290 F. 2d 22, 23 (C.A. 7); *National Labor Relations Board* v. *Stilley Plywood Co.*, 199 F. 2d 319, 320-321 (C.A. 4), certiorari denied, 344 U.S. 933; *National Labor Relations Board* v. *A. Sartorius & Co.*, 140 F. 2d 203, 206 (C.A. 2); *National Labor Relations Board* v. *Stackople Carbon Co.*, 105 F. 2d 167, 175 (C.A. 3).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 293605 652